

ACCOUNTING PUBLICATIONS SDN BHD

a

v.

HO SOO FURNITURE SDN BHD

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

SITI NORMA YAAKOB JCA

ABU MANSOR ALI JCA

[CIVIL APPEAL NO: W-02-579-96]

13 MARCH 1998

c

CIVIL PROCEDURE: *Stay of proceedings - Arbitration agreement - Exercise of discretion to grant or refuse stay pending arbitration - Principles - Whether proper for court to examine merits of alleged dispute*

ARBITRATION: *Stay of proceedings - Principles - Agreement to refer to arbitration 'dispute and difference concerning the contract' - Controversy regarding liquidated damages - Whether 'a difference concerning the contract' - Whether stay ought to be granted - Stay refused on ground that there was no dispute that came within agreement to arbitrate - Whether wrong - Arbitration Act 1950, s. 6*

d

e

The parties in this case had executed a contract for work and had therein agreed to refer "any dispute or difference concerning the contract to arbitration". Misunderstandings subsequently arose between the parties about certain liquidated damages under the contract, and following that, the respondent ('the plaintiff') filed a writ action against the appellant ('the defendant') claiming damages of RM338,164.32. The defendant contended that it was wrong of the plaintiff to have attempted to resolve the 'dispute' by a writ action, bearing in mind the arbitration clause and the fact that they, ie, the defendant, were 'ready' to proceed to arbitration. The defendant, in the circumstances, invoked the provision of s. 6 of the Arbitration Act 1950 ('the Act') and applied for a stay of the writ action. The learned Judicial Commissioner, upon examining the merits of the 'dispute', ruled however that the defendant has not satisfied the court as to the existence of a dispute that came within the term of the agreement to arbitrate, and so refused the defendant's application for stay. Dissatisfied, the defendant appealed.

f

g

h

i

a **Held:**

Per Gopal Sri Ram JCA

- b* [1] The learned Judicial Commissioner had proceeded at length to investigate the merits of the contest between the parties in order to determine whether there was a dispute that fell within the arbitration clause. In doing so she had exceeded the role assigned her when dealing with an application for a stay of proceedings under s. 6 of the Act.
- c* [2] The learned Judicial Commissioner ought to have recognised that a full blown dispute at the date of the issue of the writ is not a *sine qua non* for the exercise of the discretion conferred by s. 6 of the Act. Given a dispute, a court must compel the parties to adhere to the terms of the arbitration agreement entered into by them even though it may appear from the evidence presented upon the application for a stay that the defendant is unlikely to succeed before the arbitrator. This court is thus
- d* unable to agree with the approach adopted by the Judicial Commissioner and the conclusion at which she arrived.
- e* [3] An examination of the documentary evidence placed before the High Court sufficiently discloses a “dispute or difference” within the arbitration clause in the present instance. The mere fact that the defendant may have a weak defence to the claim asserted by the plaintiff is no reason to hold, as the Judicial Commissioner did, that there was no dispute as contemplated by the clause in question.
- f* [3a] It is to be noted that the agreement to arbitrate uses the phrase “dispute or difference concerning the contract”. The language used is certainly wide enough to include the kind of controversy that existed between the plaintiff and the defendant immediately prior to the issuance of the writ. The Judicial Commissioner had directed her mind to the word “dispute” but omitted from consideration the word “difference”. Had she done so, she would have found that the factual matrix before her amounted to a
- g* “difference” even if it did not amount to a “dispute”.
- h* [4] The learned Judicial Commissioner fell into error when she made it plain that she required the defendant to show why the parties should arbitrate and not litigate. The authorities are clear that it is for the plaintiff to demonstrate why an agreement to arbitrate that is plainly binding upon the parties thereto should be thrown overboard. The learned Judicial Commissioner had thus reversed the burden imposed by law. This apart, she also appeared to have proceeded upon the basis that the arbitration clause had the effect of ousting her jurisdiction. This is a misdirection
- i* on her part.

- [5] An application under s. 6 of the Act is not doomed to failure merely because the applicant said that it was **‘ready’** and not **‘ready and willing’** to proceed to arbitration. Under s. 6 of the Act, what is essential is that the court should, on the material before it, be in a position to express its satisfaction that the defendant is “ready and willing to do all things necessary to the proper conduct of the arbitration”. The evidence here supports the inference that the defendant was “ready and willing to do all things necessary to the proper conduct of the arbitration”. The facts also showed that the defendant had not taken any step in the proceedings **before** moving the court for a stay. a
- [6] The learned Judicial Commissioner had misdirected herself on several important respects when she exercised her discretion against the defendant. She also had not directed her mind to the salient aspects of the case. The appeal, in the circumstances, must be decided in the defendant’s favour. b
- c

[Appeal allowed.] d

[Bahasa Malaysia Translation Of Headnotes]

Pihak-pihak di sini telah memeterai suatu kontrak binaan dan telah bersetuju di dalamnya untuk merujuk “apa jua sengketa atau perbezaan berkaitan dengan kontrak kepada timbangtara”. Salahfaham telah timbul di antara pihak-pihak berhubung perkara ‘liquidated damages’ di bawah kontrak, dan berikutan itu, responden (‘plaintif’) telah mengambil tindakan writ terhadap perayu (‘defendan’) menuntut gantirugi berjumlah RM338,164.32. Defendan mengatakan bahawa adalah salah bagi plaintif bertindak melalui tindakan writ, mengambilkira fasal timbangtara dan fakta bahawa mereka, yakni defendan, ‘bersedia’ untuk meneruskan dengan timbangtara. Defendan, oleh hal yang demikian, menggunakan peruntukan s. 6 Akta Timbangtara 1950 (‘Akta’) dan memohon untuk penggantungan tindakan writ. Pesuruhjaya Kehakiman yang bijaksana, setelah meneliti merit-merit ‘sengketa’, bagaimanapun merumuskan bahawa defendan gagal memuaskan mahkamah bahawa telah wujud suatu sengketa yang dirangkumi oleh terma perjanjian timbangtara, dan dengan itu menolak permohonan untuk penggantungan. Berasa tidak puas hati, defendan merayu. e

Diputuskan: f
Oleh Gopal Sri Ram HMR g

- [1] Pesuruhjaya Kehakiman yang bijaksana telah meneliti dengan panjang lebar merit-merit sengketa di antara pihak-pihak dalam usahanya untuk menentukan samada wujud suatu sengketa yang dirangkumi oleh fasal timbangtara. Dengan berbuat demikian beliau telah bertindak melampaui tugasnya apabila mendengar permohonan untuk penggantungan di bawah s. 6 Akta. h
- i

- a* [2] Pesuruhjaya Kehakiman yang bijaksana harus sedar bahawa kewujudan persengketaan besar-besaran pada tarikh pengeluaran writ bukanlah *sine qua non* bagi melaksanakan budibicara di bawah s. 6 Akta. Apabila sengketa wujud, mahkamah mestilah mengarah pihak-pihak untuk menghormati terma perjanjian timbangtara yang mereka meterai,
- b* walaupun defendan, dari keterangan yang dikemukakan sewaktu permohonan penggantungan, kelihatan tidak akan berjaya di hadapan penimbangtara. Mahkamah ini dengan itu tidak dapat bersetuju dengan pendekatan yang diambil oleh Pesuruhjaya kehakiman serta rumusan yang dibuatnya.
- c* [3] Dengan meneliti keterangan dokumentari yang ada di hadapan mahkamah adalah jelas bahawa terdapat suatu 'dispute or difference' seperti yang dimaksudkan oleh fasal timbangtara dalam kes ini. Fakta bahawa defendan mungkin mempunyai pembelaan yang lemah tidak boleh menjadi alasan untuk merumus, sepertimana yang dirumuskan oleh
- d* Pesuruhjaya Kehakiman di sini, bahawa tidak wujud sengketa seperti yang dinyatakan oleh fasal berkenaan.
- [3a] Harus diingat bahawa perjanjian timbangtara di sini menggunakan ungkapan 'dispute or difference concerning the contract'. Bahasa yang digunakan adalah luas dan cukup untuk merangkumi bentuk kontroversi
- e* yang wujud di antara plaintif dan defendan sejurus sebelum pengeluaran writ. Pesuruhjaya Kehakiman mengambilkira perkataan 'dispute' tetapi tidak mempertimbang perkataan 'difference'. Sekiranya beliau berbuat demikian, beliau akan mendapati bahawa fakta yang wujud dihadapannya itu memang menonjolkan suatu 'difference' walaupun tidak
- f* memperlihatkan suatu 'dispute'.
- [4] Pesuruhjaya Kehakiman yang bijaksana adalah silap bilamana beliau secara terang mahukan defendan menunjukkan kenapa pihak-pihak harus bertimbangtara dan tidak mengharungi perbicaraan. Autoriti-autoriti
- g* cukup jelas bahawa tanggungan adalah atas plaintif untuk membuktikan kenapa suatu perjanjian untuk bertimbangtara yang jelas mengikat pihak-pihak harus dilemparkan begitu sahaja. Pesuruhjaya Kehakiman nampaknya telah menterbalikkan tanggungan yang diletakkan oleh undang-undang. Selain itu, beliau juga kelihatannya telah mengendalikan kes atas dasar bahawa fasal timbangtara berkenaan memberi kesan
- h* mengeneipkan bidangkuasanya. Ini adalah satu salaharahan di pihaknya.
- [5] Suatu permohonan di bawah s. 6 Akta tidak menjadi gagal semata-mata kerana pemohon mengatakan bahawa ia 'bersedia' dan tidak 'bersedia dan sanggup' untuk bertimbangtara. Di bawah s. 6 Akta, apa yang penting ialah bahawa, berdasarkan material yang ada di hadapannya, mahkamah
- i* berada dalam keadaan yang membolehkannya berkata bahawa ia

berpuashati defendan 'is ready dan willing to do all things necessary to the proper conduct of the arbitration'. Keterangan di sini menyokong inferens bahawa defendan 'was ready and willing to do all things necessary to the proper conduct of the arbitration'. Fakta juga menunjukkan bahawa defendan tidak mengambil apa-apa 'step in the proceedings' sebelum menggerakkan mahkamah untuk perintah penggantungan. a
b

[6] Pesuruhjaya Kehakiman yang bijaksana telah tersalah arah dirinya berkaitan beberapa perkara apabila melaksanakan budibicaranya 'against the defendant'. Beliau juga telah gagal memberi pertimbangan kepada beberapa aspek penting kes. Rayuan ini, dengan hal yang demikian, harus di putuskan dengan berpihak kepada defendan. c

[Rayuan dibenarkan.]

Cases referred to:

Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (**refd**) d
F & G Sykes (Wessex) Ltd v. Fine Fare Ltd [1967] 1 Lloyd's Rep 53 (**refd**)
Kong Wah Housing Development Sdn Bhd v. Desplan Construction Trading Sdn Bhd [1991] 2 CLJ 1177 (**aff**)

London and North-Western Railway v. Jones [1915] 2 KB 35 (**refd**)
Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 (**dist**) e

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400 (**fol**)
Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 (**refd**)

Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat [1996] 1 CLJ 231 (**fol**) f
Uni-Navigation Pte Ltd v. Wei Loong Shipping Pte Ltd [1993] 1 SLR 876 (**refd**)

Legislation referred to:

Arbitration Act 1950, s. 6

Other source referred to:

Commercial Arbitration, Mustill & Boyd g

For the appellant - Shahul Hamid Amiruddin; M/s Dason & Co
For the respondent - Low Kim Leng (Leonard Yeoh Soon Beng with him); M/s Soo Thien Ming & Nashrah

[Appeal from High Court, Kuala Lumpur; Suit No: S3-22-308-96] h

Reported by WA Sharif

i

*a***JUDGMENT****Gopal Sri Ram JCA:***b*

This is an appeal against the decision of the High Court refusing an application by the defendant (the appellant before us) to stay proceedings pending reference to arbitration. We heard arguments on 17 November 1997 and reserved our decision to 19 November, on which date we allowed the appeal. The reasons for our decision now follow.

c

On 30 June 1995 the plaintiff (respondent in this appeal) entered into a contract with the defendant. It was a contract for work and materials. It contained a clause by which the parties agreed to refer their disputes to arbitration. The agreement to arbitrate is contained in art. 4 of the contract. It reads:

d

If any dispute or difference concerning this Contract shall arise between the Employer [the defendant] or the Designer/Supervising Officer on his behalf and the Contractor [the plaintiff] such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in appointment of an arbitrator, a person to be appointed on the request of either party by the President of the time being of the Pertubuhan Akitek Malaysia.

e

In October 1995 a controversy arose between the parties about the liquidated and ascertained damages which the defendant alleged was due from the plaintiff because of the latter's delay in carrying out the work in question. On 2 January 1996, the plaintiff's solicitors wrote to the defendant demanding a sum of RM338,164.32 which was allegedly due to their client. The defendant responded through its solicitors on 8 January 1996, and apart from disputing the sum claimed put the plaintiff on notice that if a suit was commenced the defendant would apply to stay it because of the agreement to arbitrate. Despite this unequivocal stance taken by the defendant the plaintiff, on 26 June 1996 issued writ. The defendant then took out a summons to stay the action in reliance of the arbitration clause. The learned judicial commissioner refused to stay the action primarily on the ground that there was no dispute between the parties that came within the terms of the agreement to arbitrate. This is how she put it:

*f**g**h*

Defendant invokes Article 4 of the Contract whereby any dispute between the parties shall be referred to arbitration. Defendant in paragraph 7 of his affidavit states that he is **ready** to go to arbitration over this dispute.

i

Thus at the outset, this Court has to determine whether there is a dispute between the parties, as envisaged by Article 4 of the Contract. If there is, whether it is one where the Court's jurisdiction may be ousted, and the matter is to be referred to arbitration as agreed between the parties.

This Court therefore is to be satisfied that the matter before the Court is a dispute and therefore falls to be settled in accordance with the provision of the Article - *CCB v. Hj. Rosli* [1991] SCR 256. **a**

The contract agreement signed between Plaintiff and Defendant does not contain any definition of the term 'dispute' thus this Court would have to rely on interpretation found in authorities such as the *Gujarat State Co-operative Land Development Ltd v. Mankad* AIR [1979] SC 1203 where the word 'dispute' was defined in the following terms: **b**

The term dispute means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other. **c**

The Defendant's affidavit filed on 16/7/1995 does not state in clear terms what the 'dispute' relates to which would justify an order for stay. The Defendant merely denies the Claim for payment made by Plaintiff. It was submitted by Counsel for Defendant that the Plaintiff was late for 116 days in completing his work. **d**

The Defendant relied on minutes of on-site meetings to support this contention.

The Court has had sight of the said minutes and is of the view that although the Stop Work Order ended on 26/1/1995 the on-site meetings in any event were held **after** that date. However I could find nothing adverse against the Plaintiff in the minutes of these on-site meetings. **e**

The meeting held on 20th June instance, is telling. It talks about the delays occasioned by **other** sub-contractors, a point which has been strenuously raised time and again by the Plaintiff. Thus this minutes confirms Plaintiff's protestations regarding the evidence of delay of **other** sub-contractors, thus resulting in his own. **f**

Although the job/work description as are found in Exhibit **HWK-1** is Plaintiff's creation, it does synchronise with the contractual terms of the **30/6/1995** contract's between Plaintiff and Defendant.

The meeting held on **13/6/1995** does not make specific reference to Plaintiff's delays if any. In fact the meeting of **23/7/1995** indicated that the Plaintiff is ahead of schedule. **g**

Even if there was delay this was explained by the Plaintiff through his affidavits. It might be of interest to note that these on-site meetings were held even after the stipulated completion period. **Thus I fail to see the merit of Defendant's argument.** **h**

The Plaintiff had written a letter (Exhibit **HWK-2**) dated **14/3/1995** to Defendant's agent Bent Severin, complaining that the delay occasioned by other sub-contractors somewhat sets him back too. **i**

- a** Plaintiff submitted his demand for payment supported by Architect's Certificate issued by the agent appointed by Defendant himself (see Exhibit **HWK-3A-D**) and relies on Certificate No. 3 in his Exhibit HWK-3.
- In fact Bent Severin's letter in Exhibit HWK-5 to defendant clearly indicated satisfaction over the apparent delay caused by Plaintiff and recommended that
- b** Plaintiff be paid accordingly.
- Based on those facts, I would find that there is no dispute within the meaning of the clause on arbitration i.e. Article 4 of the Contract.
- c** **The Defendant has not satisfied the Court which he has to, in this application that there is a dispute, before the Court can exercise its discretion based on proper principles of law** (*Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill*) (*Unreported decision*). (Emphasis added.)
- With respect, we are unable to agree with the approach adopted by the judicial commissioner and the conclusion at which she arrived.
- d** A reading of the judgment appealed against makes it clear that the judicial commissioner proceeded at length to investigate the merits of the contest between the parties in order to determine whether there was a dispute that fell within the arbitration clause. In so doing, she exceeded the role assigned her when dealing with an application for a stay of proceedings under s. 6 of
- e** the Arbitration Act 1950 ("the Act"). She ought to have recognised that a full blown dispute at the date of the issue of the writ is not a *sine qua non* for the exercise of the discretion conferred by s. 6 of the Act.
- It is settled law that, given a dispute, a court must compel the parties to adhere
- f** to the terms of the arbitration agreement entered into by them even though it may appear from the evidence presented upon the application for a stay that the defendant is unlikely to succeed before the arbitrator.
- In *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 where Hashim Yeop A. Sani, CJ (Malaya) after setting
- g** out s. 6 of the Arbitration Act said (at p. 312):
- The language of s. 6 of the Act is such that if the party which opposes the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay. It is of course the court which must be satisfied that there is sufficient reason for the arbitration
- h** provision not to be complied with.
- The learned judge in this case would appear to have approached the task before him by considering the appellant's contention that there was no triable issue.
- i**

After examining the affidavits filed the learned judge found the issues of facts to be still in dispute and therefore concluded that the matter should clearly be left to be tried. On the arbitration clause the learned judge concluded that the plaintiff, being party to the agreement, cannot now choose not to be governed by the arbitration clause if the other party seeks to enforce the arbitration clause. It was, he said, the *prima facie* duty of the court to act on the agreement, citing Selbourne L.C. in *Willesford v. Watson* [1873] LR 8 Ch 473:

If parties choose to determine for themselves that they will have a domestic forum instead of resorting to ordinary courts, then, ... a *prima facie* duty is cast upon the courts to act on such agreement.

Based on materials available the conclusion of the learned judge on the triable issues is in our view completely justified.

The language used in the arbitration clause in our case is very wide. It covers 'all disputes, differences and questions' which may rise 'at any time' 'touching or arising out of or in respect of' the contract between the parties and they 'shall be referred' to arbitration. We do not think the arbitration clause can be misunderstood as to what the actual intention of the parties is, that is the parties had agreed to go to arbitration to settle any dispute, difference or question.

In '*The Evje*' [1974] 2 Lloyd's Rep 57; [1975] AC 797 the arbitration clause there also provided that all disputes from time to time arising out of the contract shall be referred to arbitration. The words 'arising out of' became an issue of interpretation.

Viscount Dilhorne said at p. 66:

In *Heyman v. Darwins Ltd* [1942] AC 356 Lord Porter said that the words 'arising out of a contract' have a wider meaning than the words 'under a contract,' a view which was repeated by Lord Justice Sellers in *Government of Gibraltar v. Kenney* [1956] 2 QB 410. Although the words are different, I must confess my inability to 'discern any difference in their content.'

In *Co-operative Central Bank Ltd v. Haji Rosli bin Haji Kamaruddin* [1991] 2 MLJ 37 this court had to be satisfied as to the meaning of the word 'dispute' to see whether the matter before the court was a dispute 'touching the business of the appellant' and therefore fell to be settled in accordance with the provisions of s. 49(1) of the Co-operative Societies Act 1948. In the course of its judgment this court adverted to *Arulandan v. Malaysian Co-operative Insurance Society Ltd* [1987] 1 MLJ 485 and *Professor Dr A Kahar Bador & Ors v. N Krishnan & Ors* [1983] 1 MLJ 412 which held that the words 'dispute touching the business of the co-operative society' must be given a wider interpretation. But as to what the meaning of the word 'dispute' is, *Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor* AIR [1979] SC 1203 was followed in which the word 'dispute' was defined in the following terms:

- a** The term “dispute” means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

The arbitration clause in our case as emphasised earlier is very wide and does not only speak of all disputes but also all differences and questions which may arise not at any specific time but at any time.

b

It was the appellant’s contention that the dispute or difference was never raised before the issue of the writ. On a proper appreciation of the background this cannot be true.

c

...

In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ, is not a ground for refusing stay, if the court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration, to rush to court at an early stage in order to defeat the arbitration agreement.

d

Once it is established that there has arisen a dispute or difference or question, the language of s. 6 of the Act places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned judge, the fact that there is apparent weakness in the respondent’s case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

e

...

f

To summarise, once the party asking for the stay has satisfied the court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause, then it is a question of exercising the discretion to grant or not to grant the stay. This discretion of the court must of course be exercised judicially and exercised according to the proper principles of law. If the appellate court is satisfied that the discretion was properly exercised, the order granted should not be disturbed. (Emphasis added).

g

In *Tan Kok Cheng & Sons Realty Co. Sdn. Bhd. v. Lim Ah Pat* [1995] 3 MLJ 273, 280 the Federal Court when considering the point said:

h

The law reports are replete with cases in which courts have refused a stay on the ground that no dispute or difference as contemplated by the particular arbitration clause in those cases has arisen. Some of these appear in the judgment of the learned judge. The rationale of those cases may be summed up in the words of Shah J, in *Union of India v. Birla Cotton Spinning & Weaving Mills Ltd* AIR [1967] SC 688, no doubt spoken in another factual context:

i

But the Union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. *It is a case in which in substance there is no dispute between the parties 'under', 'in connection with', or even 'with regard to' the contract.* The plea raised by the Union for stay of the suit was frivolous. (Emphasis added.)

a

b

From a reading of the authorities we are unable to discern any requirement that the dispute or difference should be *bona fide* – the adjective used by the learned judge to describe the nature of a dispute entitling a defendant in a suit to move a court under s. 6 of the Act. It is therefore necessary for us to decide whether this added requirement should be imposed upon a party who seeks to stay an action under s. 6 of the Act.

c

We apprehend that there are two courses open to us in this matter. The first is to interpret the words 'sufficient reason' appearing in s. 6 of the Act as imposing a very light burden on a plaintiff to show that the action should proceed. This may be achieved by placing little weight on the agreement to arbitrate and by recognizing an untrammelled discretion in the court hearing an application for a stay. One may, for instance, be prepared to uphold the exercise of discretion by a judge that there is no *bona fide* dispute. This course is, however, fraught with danger. There is the danger that it may entitle a party to a contract to disregard an obligation he had willingly undertaken.

d

e

Further, the added condition that a dispute must be *bona fide* in order for a stay to be granted would take the court into an exercise that *ex necessitate rei* involves a critical examination of the merits of the claim. Such an exercise is not contemplated by the Act and is certainly outside the parameters of the court's function under s. 6.

f

In *Gaya Electric Supply Co Ltd v. State of Bihar* AIR [1953] SC 182 at p. 185, Mahajan J explained the role of a court faced with an application for a stay of proceedings under the Indian equivalent of s. 6 of the Act in a passage that merits reproduction:

Now this is the very point which would be in issue in the suit itself, and the learned judge was in error in considering and deciding this point in this enquiry under s. 34. **The validity of the plaintiffs' contention in the suit cannot be gone into by that court exercising jurisdiction under this section as its function, is a very limited one.** The only point in such cases to be decided is whether the claim which is brought – whether it is good, bad or indifferent – comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by Bankes L.J. in *Monro v. Bognor Urban Council* [1915] 3 KB 167, are material only if the question to be considered is whether the case made

g

h

i

a was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint. (Emphasis added.)

b We would respectfully adopt these views as our own and merely add that the observations made by Mahajan J apply with equal force to a defendant. When considering an application under s. 6 of the Act, it is no part of the court's function to decide whether the defendant has raised a *bona fide* dispute warranting a stay. The strength or weakness of the issues raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen between them. It is only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious, that a court may be justified in refusing a stay.

d The agreement to arbitrate in the present instance uses the phrase "dispute or difference concerning the contract" which, in our judgment, is language of wide import. It is certainly wide enough to include the kind of controversy that existed between the plaintiff and the defendant immediately prior to the issuance of the writ. Although there may not be a dispute, yet there may be a difference between the parties concerning the contract. A failure to agree may not be a dispute; yet it is a difference. However, the judicial commissioner in the present appeal only directed her mind to the word "dispute" but omitted from consideration the words "or difference". Had she done so, she would have found that the factual matrix before her amounted to a "difference" even if, as she held, that it did not amount to a "dispute".

f In *F. & G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53, an arbitration clause had in it the words "if any difference shall arise". Danckwerts LJ in the course of delivering his concurring judgment said:

g The word 'differences' seems to me to be particularly apt for a case where the parties have not agreed: Viscount Dunedin said, in the case which was quoted to us of *May and Butcher, Ltd. v. The King* [1934] 2 KB 17n: '... a failure to agree ... is a very different thing from a dispute.' But it seems to me that the word 'difference' is particularly apt to describe that situation.

h The scope of a court's function in deciding whether a particular fact pattern constitutes a "dispute or difference" within an agreement to arbitrate was considered by the Singapore High Court in *Uni-Navigation Pte Ltd v. Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876. GP Selvam J, (then sitting as a judicial commissioner), a judge of much learning whose views are entitled to great respect said (at p. 879):

i

Jurisdiction to stay action

a

First the law. Section 7 of the Act confers on the court a discretionary power to stay an action commenced by a party to an arbitration agreement by which it has been agreed to refer the subject matter of the action to arbitration. A court seised of an application must first consider the content and extent of the arbitration agreement to confirm that the subject matter of the action is caught by the arbitration agreement.

b

Thus, in *Nova (Jersey) Knit Ltd v. Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 the arbitration agreement was part of a partnership agreement. Pursuant to it English partners sold certain machinery to German partners to be used in partnership operations in Germany. Bills of exchange issued by the Germans in payment for the machinery were dishonoured. When sued in England on the bills of exchange the German partners applied for stay of the action on the ground that the matter ought to be referred to arbitration.

c

The House of Lords held that the arbitration agreement did not extend to an action on the bill of exchange which constituted independent contracts. In addition it was held that there was no dispute as to the claims on the bills of exchange as distinct from 'disputes arising from partnership relationship or occasioned by the partnership relationship between the partnership and the partners' as was stipulated by the arbitration clause.

d

It therefore follows that where the claim is undisputed or indisputable the courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration. So, in a case where the defendant in the action has made a clear and unqualified admission of the claim the court cannot stay the action: *London and North Western Railway Co v. Jones* [1915] 2 KB 35, *London and North Western and Great Western Joint Railway Companies v. JH Billington Ltd* [1899] AC 79 and *Bede Steamship Shipping Co Ltd v. Bunge Y Born Limitada SA* [1927] 27 Lloyd's Rep. 410.

e

f

The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. The reasoning in support of this view is found in *Commercial Arbitration* by MJ Mustill and SC Boyd (2nd Edn) at p. 123:

g

Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a *bona fide* if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled

h

i

- a* by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is
- b* legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed.

If the defendant, therefore, makes out a *prima facie* case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment. (Emphasis added.)

- c* It is quite apparent from a reading of the learned judicial commissioner's judgment that she embarked upon the very kind of inquiry which the two Malaysian cases we quoted earlier in this judgment – both of which are plainly binding upon her and this court – expressly prohibit. In any event, an
- d* examination of the documentary evidence placed before the High Court sufficiently discloses a “dispute or difference” within the arbitration clause in the present instance. The mere fact that the defendant may have a weak defence to the claim asserted by the plaintiff is no reason to hold, as the judicial commissioner did, that there was no dispute as contemplated by the clause in question. This is certainly not a case, to borrow the words of Mustill
- e* & Boyd on *Commercial Arbitration*, where “the defence is very bad indeed”.

- A ready illustration of a case where a court would be entitled to disregard an arbitration clause is provided by *Elf Petroleum SE Asia Pte. Ltd. v. Winelf Petroleum Sdn. Bhd.* [1986] 1 MLJ 177. There, VC George J (later JCA)
- f* refused to grant a stay on the ground that the debt in question had been admitted and there was accordingly nothing to go to arbitration. His Lordship drew assistance from the following passage in the judgment of Rowlatt J in *London and North-Western Railway v. Jones* [1915] 2 KB 35:

- g* It is now quite clear from the decisions in *London and North Western Ry Co v. Donellan*, and *Midland Ry Co v. Loseby* that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the courts have no jurisdiction to determine that difference. It does not, however, follow that the courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry Cos v. Billington*, where the company did obtain judgment in the Courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant had accepted the services with full knowledge of what was charged
- i* without contesting their reasonableness, he could not be heard to say that there

was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that the demand has been agreed to. a

We would also add that the present appeal is readily distinguishable from *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd*. [1995] 2 MLJ 57, relied upon by counsel for the defendant because the respondent in that case “never did refer the dispute concerning the penultimate progress payment certificate ... to arbitration and having entered appearance and filed a defence to the action is precluded from taking advantage of the remedy of arbitration”. (per Edgar Joseph Jr. FCJ at p. 62 of the report.) b

There is another point upon which the learned judicial commissioner fell into error. In her judgment she has made it plain that she required the defendant to show why the parties should arbitrate and not litigate. However, the authorities are clear that it is for a plaintiff to demonstrate why an agreement to arbitrate that is plainly binding upon the parties thereto should be thrown overboard. See *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd (ibid)*. The learned judicial commissioner appears, therefore, to have reversed the burden imposed by law. c

Further, the learned judicial commissioner appears to have proceeded upon the basis that the arbitration clause had the effect of ousting her jurisdiction. Hence she said: “If there is [a dispute], whether it is one **where the Court's jurisdiction may be ousted**, and the matter is to be referred to arbitration as agreed between the parties.” We are of the view that this is a misdirection. The correct approach to the effect of an arbitration clause is that taken by Abdul Malek J (now JCA) in *Kong Wah Housing Development Sdn. Bhd. v. Desplan Construction Trading Sdn. Bhd.* [1991] 2 CLJ 1177; [1991] 3 MLJ 369, where he held that such a clause did not oust the jurisdiction of the court but the court is given a discretion to grant a stay pending arbitration. d

Before us, counsel for the plaintiff argued that the decision of the learned judicial commissioner ought in any event to be upheld for two reasons. First, because the affidavit delivered by the defendant in support of its application for a stay merely said that it was **ready** to proceed to arbitration but did not say that it was **ready and willing** to do so. This failure, it is submitted, is fatal to the defendant's application. e

Now, it is true that s. 6 of the Act says that the court may order a stay of proceedings if it is satisfied, *inter alia*, that “the applicant at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration”. But we do not f

g

h

i

- a* apprehend the law to be that an application for stay under the Act is doomed to failure unless a defendant, parrot fashion and in staccato, employs the phrase “ready and willing” in his affidavit in support. What is essential is that the court should, on the material before it be in a position to express its satisfaction that the defendant is “ready and willing to do all things necessary
- b* to the proper conduct of the arbitration”. An acceptance of the submission of the plaintiff’s counsel would result in too technical an approach to a matter that rests, by the terms of the statute, in the discretion of the court. Of the submission of counsel for the plaintiff it may be said that it fails “to recognise that at such an early stage, there is little a defendant is obliged to do in the
- c* arbitration beyond asserting a willingness to appoint an arbitrator and this, of course, means that the plaintiff will be hard put to refute the assertion.” (per Edgar Joseph Jr. SCJ in *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd*. [1994] 2 MLJ 97, 108.) The evidence that is available in the present case, when viewed in its entirety reasonably supports the inference that the defendant was, to use the language of the statute, “ready and willing
- d* to do all things necessary to the proper conduct of the arbitration”.

The second point made by counsel for the plaintiff in resisting this appeal is that the defendant had taken a step in the action **before** making its application for a stay and, like the respondent in *Pembinaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela’s Medical Centre Sdn Bhd (supra)*, is precluded from relying upon the arbitration clause. We have carefully examined the relevant chronology of events in this matter as well as the steps taken by both parties to the litigation and find that there is really no merit in the argument of plaintiff’s counsel.

- e*
- f* The writ in the present case was issued on 20 June 1996. The defendant, after entering an appearance, took out its summons for a stay of proceedings on 16 July 1996. That application was disposed of by the judicial commissioner on 26 September 1996. The defendant then delivered its defence and counterclaim on 13 November 1996. We are therefore of the view that the
- g* defendant did not take any step in the proceeding **before** moving the court for a stay. Indeed we draw support for our view from the decision in *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd*. (*ibid*) where a similar contextual fact pattern did not deter the Supreme Court from ordering a stay of the action.
- h* Having given this matter our most anxious consideration, we came to the conclusion that the learned judicial commissioner had misdirected herself in several important respects when she exercised her discretion against the defendant. We are conscious that in a appeal against the exercise of discretion the role of this court is rather limited. Our initial function is one of review
- i*

only and we have no independent discretion to exercise unless it is demonstrated to us that the case falls within one of the categories where appellate interference is warranted. If the primary judicial arbiter in whom the discretion is reposed misdirects himself upon the law or asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations, then, and then only, is a court of appeal entitled to set aside a decision arrived at and exercise an independent discretion. See *Seloga Jaya (supra)*. a
b

Upon the matter of the exercise of discretion in a case such as the present, the Federal Court in *Tan Kok Cheng & Sons Realty Co. Sdn. Bhd. v. Lim Ah Pat (supra)*, after quoting from the judgment of Edgar Joseph Jr. SCJ in *Seloga Jaya* said: c

It is implicit in the foregoing passage that, given an agreement to arbitrate and the satisfaction of the conditions set out in s. 6 of the Act, a court should lean towards the grant of a stay. This, in our judgment, is the correct approach. The residual discretion which the court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute that falls within its purview or where the third party procedure under the rules of court will most probably be resorted to. In the last of these situations, it is trite that an arbitrator has no jurisdiction to order third party proceedings. d
e

We are aware of the law's reluctance to create or recognise categories or classes of cases in the realm of the exercise of judicial discretion. But in the area of the law with which we are presently concerned, it is a necessary evil to which resort must be had to ensure that development takes place in an orderly fashion.

Returning now to the facts of the present case, we are satisfied that there was abundant evidence before the learned judge disclosing a dispute upon each of the three issues raised by Encik Zainur Zakaria in argument. We agree with counsel that there was lacking in this case a proper appreciation of the affidavit evidence on the aforesaid issues. In our judgment, the learned judge applied the wrong test and asked himself the wrong question when he held that there was no *bona fide* dispute between the parties. Indeed, we are of opinion that the learned judge went too far and was clearly wrong when he held that there must be a *bona fide* dispute for the s. 6 of the Act to bite. In our view a dispute or difference, whether *bona fide* or not would suffice. f
g

In the present case, having come to the conclusion that the learned judicial commissioner did not address her mind to the salient aspects of the case and that she had misdirected herself upon the applicable law, we have no alternative but to decide this appeal in the defendant's favour. h

i

- a* For the reasons given in this judgment we allowed the appeal and set aside the order of the judicial commissioner. We made an order in terms of the defendant's summons dated 16 July 1996 and stayed all proceedings pending arbitration. The costs of this appeal and the costs of the proceedings before the High Court were ordered to be taxed and paid by the plaintiff to the defendant.
- b* The deposit lodged in court was ordered to be refunded to the defendant.
-

c

d

e

f

g

h

i